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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 809.

EDWARD McDONELL,
Petitioner,

vs.

MARY GAREE AND COSTA B. GAREE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The District Court's Memorandum On Motions To Set Aside Verdicts And For New Trial is not reported. (R. 170-172.) The opinion of the Court of Appeals (R. 175-178) is reported in 116 Fed. (2d) 78.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 13, 1940. (R. 175.) The petition for a writ of certiorari was filed prior to March 10, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The question assigned by the petitioner is not the exact question presented by the record. Respondents deem the question raised by the record to be as follows:

Whether the trial court should have declared a mistrial because of the admission of evidence concerning petitioner's insurance, such evidence having been disclosed by the proof of a material issue properly in the case and by the innocent volunteering of such information by a witness; and in further consideration of the fact that the subject of petitioner's insurance was introduced by the petitioner himself, that the petitioner (and cross-plaintiff) in his own testimony brought out that the respondent was likewise insured and that the court in its instruction to the jury cautioned that there was no question of insurance in the case.

STATEMENT.

The facts may be summarized, as follows:

As the result of an automobile accident, respondents Mary Garee and Costa B. Garee brought suit to recover damages for the injuries thereby sustained and alleged to have resulted from the negligence of petitioner, Ed. McDonell. (R. 2.) The latter filed a counterclaim for damages to his own car. (R. 21.) Petitioner's wife and sister-in-law, who were passengers in his car at that time, obtained leave to intervene and file counterclaims for damages for their injuries also alleged to have arisen out of the negligence of Garee. (R. 16.)

The question as to McDonell's insurance was raised at the very outset of the trial by colloquy outside the hearing of the jury. Respondents had served a subpoena duces tecum upon the custodian of a certain telegram said to have been sent by McDonell to his insurance company the morning after the accident, in which he admitted liability

for it. (R. 32.) The court ruled that the telegram might be admitted in evidence without disclosing to whom it had been sent, in order to avoid letting the jury know that appellant was covered by insurance. He cautioned both sides to avoid any reference to the insurance company. Whereupon counsel for petitioner said that they could not in their defense keep from referring to it. (R. 36.)

The first witness called by respondents was petitioner, who was asked questions tending to show how the accident happened, and his admissions of liability at that time. (R. 37.) In reply to a question as to whether anyone helped him prepare the telegram, he stated that he and the others present talked about it, and he said he wanted to send it to the insurance company so they would give them some help. (R. 38.) This was the first mention of the matter of insurance in the presence of the jury, and petitioner's own counsel made no objection to it. Petitioner made several more voluntary references to the insurance company (R. 41), and one to "my company" (R. 39) during the course of his examination by counsel for respondents.

Counsel for petitioner finally interposed an objection to a question as to a conversation at petitioner's home, directed to its materiality. (R. 40, 41.) He also objected to a question as to whose idea it was that McDonell was to make a claim against Garee, which was sustained by the court after argument outside the hearing of the jury. (R. 41.) He then made a motion to withdraw a juror and declare a mistrial on the ground that the primary purpose of cross-examining petitioner had been to bring out the fact that petitioner carried insurance. (R. 42.) The motion was overruled.

On cross examination respondent Costa Garee was asked by petitioner's counsel whether he took the name of petitioner's insurance company after the accident.

Petitioner, in his own testimony, brought out that he was insured and that the respondent was likewise insured.

(R. 110.) The matter of insurance was referred to by petitioner's counsel in his closing argument. (R. 144.) The court in its instructions to the jury told them that there was no question of insurance in the case. (R. 136.)

The jury returned verdicts for the respondents. The jury also found that respondent Costa B. Garee was not guilty as to the cross-complaints, and not guilty as to the counterclaim of petitioner, Ed. McDonell. (R. 145.)

The proceedings which occurred thereafter are set forth on page 2 of the petition.

SUMMARY OF ARGUMENT.

1. The question presented by the record in this case is, briefly, whether the trial court should have declared a mistrial because of the admission of evidence concerning petitioner's insurance, such evidence having been disclosed by the proof of a material issue properly admissible, and by the volunteering of such information by a witness. The lower court properly held that the general rule making it error in the trial of an action for personal injuries to permit the plaintiff to introduce evidence to show the defendant is protected by insurance is subject to qualifications and exceptions, two of which are (1) that such evidence may be used to prove some material issue properly in the case, and (2) that the disclosure of such evidence is not a basis for reversal of the verdict and judgment where innocently volunteered by a witness.

2. The question presented by petitioner—whether a verdict against petitioner and in favor of respondent, induced by proof that petitioner was insured, should be permitted to stand—was not the exact question decided by the lower court. The lower court recognized the general rule as to the inadmissibility of evidence tending to inform a jury of liability insurance, but the court also recognized the above mentioned exceptions thereto, and determined that the record disclosed that the issue before it was deter-

minable by such exceptions and not the general rule. Furthermore, the question framed by petitioner obviously contemplates the application of the general rule which has had almost uniform application, and which has not given rise to conflicting decisions. Therefore, the question posed by petitioner is not of that character which this Court will review on writ of certiorari.

3. Where the evidence amply warrants a verdict and the amount thereof, there is no occasion to order a reversal on an unsupported assumption that the jury were by passing references to insurance rendered incapable of fairly considering the relevant facts or of reaching an impartial verdict. Where both parties are shown to have carried insurance under the conditions above stated, such an assumption would be an absurdity.

ARGUMENT.

1. It is not difficult to defend the opinion of the Circuit Court of Appeals. That court held that the rule as to the inadmissibility of evidence tending to inform a jury of liability insurance is not an inflexible one. While such evidence is ordinarily not admissible, it may be used to prove some material issue properly in the case, and the fact that it is not admissible to prove another matter does not render it incompetent. Hence, the court held, the telegram sought to be introduced was clearly admissible to prove petitioner's admission of liability. That it could have been introduced without showing that insurance was involved does not change the situation in view of petitioner's part in opening up the subject. And another exception, the court said, arises when the information is innocently volunteered by a witness. (R. 178.)

Consequently, it appears that the court had before it the question whether the record disclosed an instance for the application of the general rule or for the exceptions thereto. The court resolved that question in favor of the

application of the exceptions. That conclusion finds support in the Record.

The Supreme Court of Illinois, together with the federal and most state courts recognize the exceptions to the general rule.

In *Williams v. Consumers Co.*, 352 Ill. 51, 185 N. E. 217, an action for personal injuries received in an automobile accident, a witness made a remark tending to show defendant was insured. Defendant's counsel moved to withdraw a juror and have the court declare a mistrial. The motion was denied. In the Supreme Court of Illinois the defendant urged the court to reverse the judgment for plaintiff on the ground that the motion should have been granted. The court affirmed the judgment. Defendant cited a number of Illinois decisions in support of the proposition that the injection of the evidence of insurance at the trial was grounds for reversing the case. At page 55 of the opinion, the court said:

> "We have examined these cases but find none where a mistrial has ever been granted on account of an inadvertent or unresponsive answer of a witness to a legitimate inquiry. Generally, where prejudicial error has been declared it is found to have been due to some misconduct or improper remarks or questions of counsel ofttimes repeated, and calculated to influence or prejudice the jury."

In *Stilson v. Ellis*, 208 Ia. 1157, 225 N. W. 346, plaintiff brought the action to recover damages for personal injuries through the negligence of defendant. After trial to a jury there was a verdict for plaintiff, and the defendants appealed on the ground, among others, that there was injected into the record references to the fact that defendant carried liability insurance. Witnesses brought the matter before the jury by relating conversations that took place in defendant's home immediately after the accident

The defendant herself made statements regarding this insurance. The Supreme Court of Iowa held that whatever may have been said in reference to insurance did not require a reversal of the judgment below. At page 1169 of the opinion, the court said:

> "Assuming that what was said by the Ellises (defendants) at that time was admissible as an admission against interest (as the record seems to show), it cannot be complained because a part thereof referred to the liability insurance. Admissions against interest are such even though they may embody information concerning insurance carried by the declarant. This conversation aforesaid was innocently related by the witnesses upon the stand, apparently without any thought of injecting prejudicial subjects into the record. The trial court by special instruction, told the jury the following: 'Any evidence introduced concerning insurance is withdrawn from your consideration, and you are directed to disregard such testimony and not to discuss the same, nor allow it to influence your verdict.' "

In *Ward v. DeYoung,* 210 Mich. 67, 177 N. W. 213, the Supreme Court of Michigan held that in an action for injuries suffered by a cyclist, who was run down by defendant's motor car, the admission of evidence showing an admission of liability by a defendant was proper, even though defendant in making such admission stated he carried insurance. At page 76 of the opinion, the court said:

> "The fact that a defendant is so insured should not render him immune from having his admissions used against him when favorable to plaintiff, and, if in placing before the jury a statement made by him, or conversation indulged in, which tends to show such admissions, it appears as a part thereof that he is so protected, he has only himself to blame therefor."

No purpose would be served burdening this brief with a detailed analysis of more cases which support the exceptions to the general rule. Suffice it to say that prac-

tically all jurisdictions have recognized these qualifications, and exceptions, and the same have been approved by bench and bar; the tendency to relax the general rule becoming more evident. *Jupallo P. S. Co. v. Grant,* 42 Fed. (2d) 18 (C. C. A. 4th); *Hazeltine v. Johnson,* 92 Fed. (2d) 866 (C. C. A. 9th); *Jessup V. Davis,* 115 Neb. 1, 211 N. W. 190; *Bauer v. Reavell,* 219 Iowa 1212, 260 N. W. 39; *Meinecke v. International Transp. Co.,* 101 Mont. 315, 55 P. (2d) 680; *Goodale v. Hathaway,* 149 Or. 237, 39 P. (2d) 678; *Anderson v. Drackworth,* 162 Mass. 251, 38 N. E. 510; *Flieg v. Levy,* 148 App. Div. 781, 133 N. Y. Supp. 249, affirmed in 208 N. Y. 564, 101 N. E. 1102; 105 *A. L. R.* 1326, 1327; 95 *A. L. R.* 398, 399; 74 *A. L. R.* 856, 858; 56 *A. L. R.* 1448, 1451; *Couch Cyclopedia of Insurance Law,* Vol. 8, pp. 7371-7385; *Wigmore on Evidence,* Vol. 2 (3rd Edition) pp. 133-150.

2. Petitioner contends at page 3 of his petition that there is a conflict between the decision in the case at bar and the decisions of other Circuit Courts of Appeals and the State Courts of Illinois on the same matter. Thereby petitioner attempts to invoke the jurisdiction of this Court. However, no such conflict exists. The cases which petitioner cites represent authority for the general rule excluding evidence of a liability insurer. None of them deal with the exceptions to the general rule.

Petitioner cites *Stewart & Co. v. Newby,* 266 Fed. 287 (C. C. A. 4th). In that case the attorney for the plaintiff, over objection of opposing counsel, repeatedly attempted to prove that defendant was protected by insurance, and that the Accident Insurance Company was liable for whatever damages might be recovered in the case. This evidence was not excluded until the conclusion of the whole testimony. Unlike the case at bar the evidence of insurance did not appear by an admission of liability in a telegram or other document which would clearly be within the exception and

admissible. Also, unlike the instant case, in the *Newby* case counsel for plaintiff repeatedly attempted to prove the insurance protection, whereas here counsel for plaintiff sought only to prove that a telegram had been sent by defendant which admitted the liability. This same Circuit (4th) has approved the exception to the general rule in favor of voluntary statements and admissions against interest in *Jupallo P. S. Co. v. Grant*, 42 Fed. (2d) 18.

Petitioner cites *Brooks v. Croson*, 58 F. (2d) 885 (C. A. D. C.). In that case, another one which supports the general rule and does not present facts which would occasion the application of the exceptions thereto, the trial court did not exclude testimony that the defendant was insured, failed to caution the jury concerning it, and permitted its submission as evidence "to be considered by the jury, along with the other evidence in the case." The court held that the instruction was a distinct violation of the general rule inasmuch as it treated the plaintiff's testimony relating to the existence of liability insurance as substantive proof tending to establish the charge of negligence against defendant. Thus, the holding of this case, too, is not controlling in the case at bar, because it does not deal with exceptions to the general rule and because the lower court in the case at bar did not permit the evidence of insurance to be submitted as proof of negligence.

Petitioner cites in support of his position the case of *Clark v. Hasselquist*, 304 Ill. App. 41. In that case the plaintiff, by the questions asked and by the final argument of his counsel, succeeded in apprising the jury he was interviewed by a party who was investigating the case for the defendant, and for his attorneys, and for the Travelers Insurance Company, and that the investigator's purpose in procuring a statement from plaintiff was to help the Insurance Company. The Supreme Court held that the inquiry was for no other purpose than to disclose to the jury

that defendant was protected by liability insurance. Unlike the case at bar, in the *Clark* case the insurance factor was not disclosed in an admission of liability or by voluntary disclosure by the defendant. Furthermore, the final argument of plaintiff's counsel in the *Clark* case was prejudicial.

It may be said of all the cases upon which this defendant relies, that they present factual situations calling for the application of the general rule that evidence of liability insurance is not admissible. As such, these cases cannot be determinative of the case at bar because this case comes within the qualifications and exceptions to that rule.

In any event, it is quite clear that there is no conflict in these decisions, as claimed by petitioner. Each supports the general rule. And it is readily apparent that the cases upon which petitioner relies are not in conflict with the opinion of the Circuit Court of Appeals in this case, for the reason that the case at bar presents a situation which makes necessary the application of exceptions to the general rule. The exception to a rule of law is not in conflict therewith.

3. Petitioner claims in his brief that the evidence in the case at bar was close and conflicting and therefore the reference to insurance is the basis for a reversal of the judgment obtained. However, both of the lower courts found that the evidence amply warranted the verdict and the amount thereof. In its Memorandum On Motions To Set Aside Verdicts And For New Trial, the District Court said (R. 171):

> "Over and above all, however, I am well convinced that on the merits the jury's verdict comes just as near speaking the truth as it is possible for a court or jury to arrive at the truth through a haze of conflicting testimony. * * * The Jury's conclusion on this question finds ample support in the evidence. and the amount of damages allowed is well within the evidence. The

jury was called upon to render five separate verdicts and whatever may be said of the five verdicts they at least have the merit of consistency."

Thus it appears that petitioner's claim that the jury were rendered incapable of fairly considering the facts or of reaching an impartial verdict is entirely based on an unsupported assumption which is not the basis for granting a new trial. This same question was raised in *Hazeltine v. Johnson*, 92 Fed. (2d) 866 (C. C. A. 9th). There, the court said at page 870 of the opinion:

> "There was an impressive showing of want of due care on the part of appellant and the proof amply warrants the amount of the verdict. There is no occasion to order a reversal here on the unsupported assumption that the jury were by this passing reference (to insurance) rendered incapable of fairly considering the relevant facts or of reaching an impartial verdict." See also *Williams v. Consumers Company*, 352 Ill. 51, 185 N. E. 217, *supra*.

Furthermore, in the instant case both parties were shown to have carried insurance. (R. 110.) Under such circumstances it would be an absurdity to assume that the jury were by passing references to insurance rendered incapable of fairly considering the relevant facts or of reaching an impartial verdict.

CONCLUSION.

Respondents submit that the decision of the Circuit Court of Appeals is not in conflict with the decisions of any other Circuit Court of Appeals. That the decision is consistent with prior decisions of the Supreme Court of Illinois, federal courts, and other state courts, which have held that the rule as to the inadmissibility of evidence tending to inform a jury of liability insurance is not an inflexible one, since such evidence may be used to prove some material issue properly in the case, or, if innocently volunteered by

a witness, prejudicial error does not result, especially where the one at fault is the complaining party.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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